

**Education Cabinet**

**Kentucky Board of Education**

**Department of Education**

**(Amendment)**

**702 KAR 4:160. Capital construction process.**

RELATES TO: KRS 156.160, 157.420, 162.060, 162.065, 162.070, 160.160, 322.360,  
323.033

STATUTORY AUTHORITY: KRS 156.070, 156.160, 157.420, 162.060, 162.065

NECESSITY, FUNCTION, AND CONFORMITY: KRS 156.160 requires the Kentucky Board of Education (KBE) to promulgate administrative regulations establishing standards that school districts shall meet in operational performance, including construction of public school buildings and the use of uniform forms. KRS 157.420 requires each school district's capital outlay to be utilized in accordance with the district's facility plan. KRS 162.060 requires approval of all school building plans and specifications by the chief state school officer. KRS 162.065 requires the KBE to prescribe administrative regulations governing construction managers. KRS 162.070 requires school construction contracts to be awarded to the lowest and best responsible bidder. KRS 322.360 requires a school district, when engaged in the construction of any public work involving engineering, to utilize an architect or engineer to directly supervise the preparation of plans and specifications, estimates, and the execution of construction. KRS 323.033 requires the services of an architect for new buildings and additions or alterations to existing buildings classified as

educational use group, including the administration of construction contracts. This administrative regulation establishes the procedures and criteria for the construction of public school buildings.

Section 1. Definitions.

(1) "AIA" means the American Institute of Architects.

(2) "Architect" means any design professional licensed in the Commonwealth of Kentucky under KRS Chapters 322, 323, or 323A, which includes architects, engineers, and landscape architects.

(3) "Board" means the local board of education.

(4) "Construction manager" or "CM" means a qualified and experienced contracting organization which provides the services of construction management and possesses a general trades workforce, staff and equipment, financial base, insurance coverage, bonding capability, a minimum of three (3) years' construction management experience on projects of \$2,000,000 [~~\$1,000,000~~] or more, and the ability to provide the services required.

(5) "Contract Documents" means the owner-contractor agreement, conditions of the contract (general, supplementary and other conditions), purchase Orders, drawings, specifications, addenda issued prior to execution of the owner-contractor agreement, other documents listed in the owner-contractor agreement, and modifications issued after the execution of the agreement.

(6) [~~(5)~~] "Division" means the Division of Facilities Management, Kentucky Department of Education (KDE).

(7) [~~(6)~~] "Emergency" means the loss of use of physical facilities resulting from an unforeseen occurrence which requires prompt action.

(8) ~~[(7)]~~ "Fixed equipment" means furnishings or equipment which are secured to the wall, floor, or ceiling to operate or function in the manner intended by the product manufacturer. Examples of fixed equipment are bleachers, student lockers, casework with sinks, and plumbing fixtures.

(9) ~~[(8)]~~ "KERA" means Kentucky Education Reform Act.

(10) ~~[(9)]~~ "Moveable equipment" means any furnishings or equipment not considered fixed equipment.

(11) ~~[(10)]~~ "Owner" means the local board of education or financing corporation established for the purpose of financing school construction.

(12) "Record Drawings" means a set of reproducible drawings revised to indicate significant changes in the work during construction, including addenda, change orders, and construction change directives.

(13) ~~[(11)]~~ "Superintendent" means the superintendent of the local school district or the employee the superintendent has selected to represent the board regarding construction issues.

## Section 2. Construction Project Application.

(1) The board shall submit an application on form BG #1 to the division for approval of a proposed construction project.

(2) An application shall be submitted for any project that is:

(a) Funded by Support Education Excellence in Kentucky (SEEK) capital outlay, Facility Support Program of Kentucky (FSPK) funds as provided by KRS 157.620, School Facilities Construction Commission (SFCC) funds, or building funds as provided by KRS 160.476; or

(b) Proposing construction of a new building, addition, or alteration of an existing building that ~~[which]~~ requires design by an architect for a building or building system.

(3) To initiate a project ~~[which is]~~ listed in its facility plan or a minor project permitted in subsection (8) ~~[(9)]~~ of this section, a vote by the board approving the project shall be required.

(4) When SFCC funds are included in the financing plan, projects shall be selected in prioritized order. If no SFCC funding is included in the financing plan, the board may select a project on its facility plan without regard to priority number.

~~[(5) If a project exceeds \$250,000, the superintendent shall submit the BG #1 to the division, and shall review the project scope and financing plan with the division.]~~

(5) ~~[(6)]~~ The BG #1 shall be accompanied by:

(a) A copy of the board's action, either by official board minutes or an unofficial excerpt signed by the board secretary verifying authenticity, approving the application; and

(b) A narrative justification of the construction project selection, including its priority over other projects relative to district goals and maximization of funding and benefits to students.

(6) ~~[(7)]~~ Within sixty (60) days of receiving the completed application documents, the BG #1 shall be approved by the division, if justified pursuant to the following criteria:

(a) Proposed project is on the facility plan or conforms to minor project criteria in subsection (8) ~~[(9)]~~ of this section;

(b) SFCC funding does not exceed the SFCC maximum budget established for the project;

(c) Application has original signatures;

(d) A board order; and

(e) The narrative justification.

(7) ~~[(8)]~~ The Division of District Operations ~~[Finance]~~, KDE, may give tentative approval based on a review of the board's ability to support the financing plan for the proposed construction budget.

(8) ~~[(9)]~~ The board may submit a BG #1 for minor projects not listed in the facility plan if the project meets the following criteria:

(a) Expansion of a permanent center or functional center to include a maximum of four (4) classrooms when documentation to support the request is provided for either student population growth or curriculum changes;

(b) Campus enlargement, minor renovation of buildings and building systems, or construction of an additional support space at permanent or functional centers when its need can be documented and justified; or

(c) Projects to comply with statutes and administrative regulations of other agencies having jurisdiction.

(9) ~~[(10)]~~ If no action is taken by the board within one (1) year from the date of the BG #1 approval, the approval shall ~~[be]~~ no longer be effective.

(10) ~~[(11)]~~ If the division considers the architect, CM, or board to be nonresponsive or causing undue delays in the design schedule, it may request the chief state school officer to revoke the BG #1 approval.

(11) ~~[(12)]~~ If an emergency requiring the submission of a BG #1 occurs:

(a) The emergency shall be declared in accordance with KRS 424.260 or 45A.380, whichever is applicable; and

(b) The board shall:

1. Notify the division and request approval to proceed with the plans and corrective action;
2. Submit to the division:
  - a. BG #1;
  - b. Copy of board order declaring the emergency; and
  - c. Copy of the written determination as required by KRS 45A.380 for those districts that ~~[which]~~ have adopted the Model Procurement Code.

Section 3. Local Board Oversight Responsibilities.

(1) Construction files and records shall be maintained by the superintendent in the central office and organized and accessible for review. Construction files and records include:

- (a) Board actions;
- (b) Proposals (bids);
- (c) Contracts, contract documents and record drawings;
- (d) Correspondence; and
- (e) Financial documents.

(2) During the design phases of new school building projects, limit the maximum gross area for elementary schools to 110 percent of the Total Gross Area of the Model Program Space, and limit the maximum gross area for middle and high schools to 115 percent of the Total Gross Area of the Model Program Space. Model Program Space is given in 702 KAR 4:180.

(3) ~~[(2)]~~ If the architect or the CM determines additional funding is justified or a reduction of physical scope of the project is needed, the local board may approve the action if it believes it is justified and forward it to the division.

(4) ~~[(3)]~~ During the planning and bidding phase of the construction project, the board shall:

- (a) Review bidding documents for compliance with statutes and administrative regulations, with particular attention to sales and use tax exemption when purchasing materials direct;
- (b) Comply with all submission requirements resulting from the ~~[completed plans and specification]~~ review of bidding documents by the division;
- (c) Not advertise before receipt of written approval from the division;
- (d) Advertise in the newspaper having the largest circulation in the school district the following number of days prior to the date established to receive bids:
  - 1. \$1,000,000 or less project, a minimum of seven (7) days and a maximum of twenty-one (21) days; or
  - 2. A project in excess of \$1,000,000, a minimum of twenty-one (21) days;
- (e) Hold the bid opening:
  - 1. In a location accessible to the public;
  - 2. Between 10 a.m. and 3 p.m. (local time); and
  - 3. Monday through Friday, excluding holidays;
- (f) Accept the architect's and CM's evaluation of the bids and approve or reject their recommendations; giving consideration during the review process to businesses owned by minorities and women.
- ~~[(g) Review any bid package which receives only one (1) bid to ensure specifications allowed open competition. The board may approve the contract if the bid does not exceed 110 percent of the bid estimate and is within the budget for the project;]~~
- (g) ~~[(h)]~~ Ensure the CM completes the KDE Non-Collusion Affidavit ~~[noncollusion affidavit];~~
- (h) ~~[(i)]~~ Hold possession of original bidding documents;

(i) ~~[(i)]~~ Approve and submit the successful bidders' documents to the division for review and approval of the proposed contract(s) and the financial plan; and

(j) ~~[(k)]~~ Have in its possession prior to executing the construction contract:

1. Contractor's performance and payment bond;

2. Certificate of required insurance;

3. Property insurance policy;

4. ~~[3-]~~ Written approval from the division; and

5. ~~[4-]~~ Bids accepted for the bond sale, when applicable.

(5) ~~[(4)]~~ During the construction administration of the project, the board shall:

(a) Name the superintendent or his or her representative, known as the owner's representative, to speak on behalf of the board as owner in the contract documents and set the parameters of that responsibility;

(b) Seek the superintendent's recommendation relative to proposed board actions;

(c) Approve all expenditures from the construction account;

(d) Seek SFCC approval of expenditures as applicable;

(e) At least once per month receive and review written on-site observation ~~[inspection]~~ and progress reports provided by the architect;

(f) Review the need for changes to the contract;

(g) Assign partial or full responsibility to the proper party if additional costs are due to an oversight or omission;

(h) Monitor the administration of the project by its architect and CM to ensure no prepayment is made for their services;



- (i) After notifying the division, hire a professional services firm experienced in architectural, engineering, accounting, or construction management services to provide an audit of the construction project if the board suspects nonfeasance or malfeasance;
  - (j) Secure all required inspections and close out documents for submittal to the appropriate agencies;
  - (k) Receive a certificate of occupancy [~~an occupancy permit~~] from the Department of Housing, Buildings and Construction or local building code authority having expanded jurisdiction prior to occupying the facility;
  - (l) Retain a minimum five (5) percent retainage of the construction contract until substantial completion of the work as defined in AIA Document A201-2007, General Conditions of the Contract for Construction [~~the division has issued a written approval either to reduce the contract retainage or to make final payment on the contract~~];
  - (m) Require the superintendent or the owner's representative to participate in the year-end [~~warranty~~] inspection and report results of the inspection to the board;
  - (n) Contact the contractor's bonding company each month if the contractor is more than two (2) weeks behind schedule or is not performing in accordance with the contract; and
  - (o) Not hire additional architectural services outside the architect's contract without approval from the division.
- (6) [~~(5)~~] If federal funds or federal agencies are involved, the board may request approval from the chief state school officer to waive or condense procedures to expedite the construction design process.

(7) [(6)] If a lien is filed with a court and the board is given notice of the lien, the board shall stop partial payments on the contract in the amount of the lien and contact the division. Payments may begin after:

- (a) The lien has been released;
- (b) The division has approved a payment schedule which provides for retaining the lien amount being contested; or
- (c) The division has approved a payment schedule after a surety bond has been provided to pay the lien.

#### Section 4. Architectural Services.

(1) The board and architect shall negotiate a contract for services required. The board shall either advertise for architectural services or select a minimum of three (3) architectural firms that [which] shall be evaluated through the request for proposal (RFP) process, giving consideration during the review process to businesses owned by minorities and women.

Advertisement or RFP evaluation of three (3) firms is not required if the total construction cost of the project is estimated at less than \$1,000,000 [~~\$500,000~~] or is the continuation of phased construction at the same site.

(2) The architectural services shall be negotiated using the following documents:

- (a) KDE Architect RFP, if utilized;
- (b) AIA B101-2007, [~~B151-1997, Abbreviated~~] Standard Form of Agreement Between Owner and Architect, or AIA B141/CMA-1992, Standard Form of Agreement Between Owner and Architect, Construction Manager - Adviser Edition, with KDE amendments;
- (c) KDE Non-Collusion Affidavit [~~noncollusion affidavit~~]; and

(d) KDE architect fee guideline as a percentage of the cost of construction, or a lump sum fee. [~~or SFCC fee maximum~~] .

(3) A letter of agreement stating services, terms, and conditions that [~~which~~] have [~~has~~] been approved by the board shall be acceptable in lieu of the AIA B101 [~~B151~~] for projects with an estimated construction cost of less than \$50,000 [~~\$25,000~~].

(4) The division shall review and approve the proposed architect's contract based on the following criteria:

(a) Copy of the board action approving the terms of the proposed contract;

(b) Scope and fee conforms to BG #1; and

(c) Submittal of required forms.

(5) The division shall advise the board of:

(a) Apparent deficiencies in completion of the contract;

(b) Discrepancies related to the scope of work and anticipated cost approved on the BG #1;

(c) Compliance of fee to fee schedule; and

(d) Concerns regarding modifications to the contract.

(6) The architect shall:

(a) Provide on-site visitation and shall report on the construction project to the board;

(b) Certify, to the best of his ability, professional judgment, and with due diligence, that all phases of the project have been completed in conformance with the approved plans and specifications and any authorized changes by signing the BG-4 form;

(c) Provide professional liability insurance [~~including errors and omission insurance~~] in the following minimum amounts:

1. Projects [~~less than~~] \$1,000,000, or less require \$500,000 [~~[\$250,000] per claim and \$1,000,000 aggregate per annum~~] [~~with a five (5) percent maximum deductible~~];
2. Projects exceeding [~~from~~] \$1,000,000 [~~to \$10,000,000~~] require \$1,000,000 per claim and \$2,000,000 aggregate per annum; [~~with a maximum five (5) percent deductible; and~~]  
[~~3. Projects \$10,000,000 or greater require \$2,000,000 insurance with a maximum five (5) percent deductible; ]~~]
- (d) Require his consultants to retain professional liability insurance [~~including errors and omission insurance~~] in the minimum amount of \$250,000 aggregate [~~with a maximum five (5) percent deductible~~], except structural design and mechanical-electrical-plumbing consultants shall carry a minimum amount of \$1,000,000 aggregate for projects \$1,000,000 or less, and \$2,000,000 aggregate for projects exceeding \$1,000,000.
- (e) Provide copies of certificates of insurance to the division;
- (f) Assist in preparing the bid advertisement for the board;
- (g) List projects estimated in excess of \$1,000,000 with a minimum of two (2) Kentucky construction reporting services;
- (h) Submit to the board a written report that [~~which~~] includes a status of the project, dates and times architect was on site, conditions of the job, problems, delays, and concerns at least monthly after construction begins;
- (i) Request payment of construction administration phase fee at the same proportionate percentage as the construction's completion [~~with five (5) percent of it being retained by the board until the approval of final payment on construction~~];
- (j) Request approval by the owner's representative [~~board~~] for any reimbursement or additional service prior to the service being rendered or expenditure being made;

(k) When requesting reimbursements or additional service fees, provide a detailed listing of each charge on the payment request;

(l) Request additional payment for construction time or services extending [~~which extend~~] beyond the scheduled completion date, provided the [~~only if the owner is successful in receiving liquidated damages. Conditions to receive payments shall be:~~

~~1.]~~ [A] additional costs were incurred through no fault of the architectural firm and are documented due to the delay of the contractor, subcontractors, material suppliers, or vendors;[~~and~~]

~~[2. The pro rata share shall be determined by the board as a ratio of validated architect's damages to the total of all documented damages;]~~

(m) Utilize his consultants listed on the contract form for design, construction administration and observation of the work;

(n) Pay his consultants the same percentage proportion of their fee as he has received from the board;

(o) Pay his consultants eighty (80) percent of the architect's fee based on the construction cost of the consultant's work. If the architect's fee is a lump sum, the consultant shall receive the same proportionate amount;

(p) If a joint venture, list on the contract form [ ; ]the prime architectural firm accountable to the board and provide the board with a copy of the joint venture contract indicating each party's responsibilities and fees;

(q) Provide independent contract administration over construction contracts awarded to the project's CM [; ~~and~~

~~(r) Not include in the construction cost calculation change orders to the contract that the board has not requested. Changes to the contract requested by the board that decrease the construction cost shall be calculated at the hourly billing rate schedule or basic fee percentage, whichever is less].~~

(7) The board shall provide oversight of the architectural services in the following manner:

(a) The architect's proposed contract shall be reviewed by the board's attorney for compliance with the law; and

(b) The board shall submit to the division for approval:

1. The proposed architect contract ~~[and completed RFP]~~;
2. A copy of the board order approving the contract;
3. A narrative of the selection and evaluation process; ~~[and]~~
4. A copy of the certificate(s) of required ~~[professional]~~ liability insurance; ~~and [-]~~
5. A copy of the KDE Non-Collusion Affidavit(s).

#### Section 5. Construction Management Services.

(1) A CM shall not be employed on any project estimated at less than \$2,000,000, ~~[\$1,000,000]~~ or without the approval of the division if the number of work categories negate the need for full-time, on-site supervision for projects in excess of \$2,000,000 ~~[\$1,000,000]~~. The division may approve exceptions as follows:

(a) If the project is a phase of a phased project and the CM is to be employed on all subsequent phases; or

(b) If the project's complexity or fiscal soundness requires it.

(2) In hiring a CM, the board shall either advertise for CM services or select a minimum of three (3) construction management firms that ~~[which]~~ shall be evaluated through the RFP

process. Advertisement or RFP evaluation of three (3) firms is not required if the project is the continuation of phased construction at the same site.

(3) The board shall negotiate a contract using the following:

(a) KDE CM RFP, if utilized;

(b) AIA B801/CMa-1992 AIA, Standard Form of Agreement Between Owner and Construction Manager and KDE amendment;

(c) KDE CM fee guideline or lump sum price;

(d) KDE Non-Collusion Affidavit [~~noncollusion affidavit~~];

(e) Projected number of months construction;

(f) On-site services fee per month; and

(g) Fee scale for additional construction cost and months.

(4) The number of months in the CM contract for the construction phase shall not be altered unless:

(a) There is a change in the scope of the work; and

(b) The owner, architect, and CM agree to the revised number of months during the evaluation of construction bids.

(5) The preconstruction phase payment shall be a maximum of ten (10) percent of the total proposed fee.

(6) The CM shall:

(a) Provide a 100 percent performance and payment bond prior to the construction contracts being executed by the board in the amount of the CM fee from an insurance firm authorized to do business in Kentucky and listed in and written within the terms and limits established in 31 CFR 223;

(b) Provide professional liability insurance ~~with errors and omissions~~ in the following minimum amounts:

1. Projects of \$10,000,000 or less, insurance in the amount of \$500,000 [~~with a maximum five (5) percent deductible~~]; or
2. For projects in excess of \$10,000,000, insurance in the amount of \$1,000,000 [~~with a maximum five (5) percent deductible~~];

(c) Develop bid packaging to ensure at least five (5) known potential bidders are notified on each bid package;

(d) Not transport any bidder's proposal to the bid opening;

(e) Complete a KDE Non-Collusion Affidavit [~~noncollusion affidavit~~] relative to both the superintendent and local board members and the apparent low bidders;

(f) Request approval by the owner's representative [~~board~~] for any reimbursement or additional service fee prior to the service being rendered or expenditure being made;

(g) When requesting reimbursements or additional service fees, provide a detailed listing of each charge on the payment request;

(h) Request additional payment for construction time or services extending [~~which extend~~] beyond the scheduled completion date, provided the [~~only if the owner is successful in receiving liquidated damages. Conditions to receive payments shall be:~~

1-] [A] additional costs were incurred through no fault of the construction management firm and are documented due to the delay of a [the] contractor; material supplier, or vendor [~~and~~

2. The pro rata share shall be determined by the board as a ratio of validated construction manager's damages to the total of all documented damages]; and



~~[(i) Not include in the construction calculation change orders to the contract that the board has not requested. Changes to the contract requested by the board that decrease the construction cost shall be calculated at the hourly billing rate schedule or basic fee percentage, whichever is less; and]~~

(i) ~~[(f)]~~ Request payment of the construction phase fee at the same proportionate percentage as the construction's completion ~~[with five (5) percent of it being retained by the board until approval of the final payment on construction].~~

(7) The board shall provide oversight of the CM services in the following manner:

(a) Retain an attorney to:

1. Review the contract as negotiated to ensure compliance with the law;
2. Request modifications to the contract as needed; and
3. Sign the contract form attesting to review;

(b) Take action approving the contract terms and conditions; and

(c) Forward to the division for review and approval:

1. Copy of ~~[the RFP and]~~ proposed contract;
2. Board order;
3. Narrative of the selection and evaluation process;
4. Certificate of required ~~[professional]~~ liability insurance; and
5. KDE Non-Collusion Affidavit ~~[noncollusion affidavit]~~.

(8) The CM contract shall be reviewed and approved by the division based on the following criteria:

- (a) A copy of board order of approval;
- (b) Fee based on a lump sum amount or fee guideline;

- (c) Modifications to the contract comply with laws; and
- (d) Submission of required forms.

Section 6. Plans and Specifications.

(1) After approval of the BG #1 application by the division, the division shall provide a procedural checklist to the board that indicates required submissions for the project.

(a) The architect shall prepare [a] schematic plans of the proposed construction from written educational program specifications supplied by the board.

(b) The schematic plans and a copy of the educational program specifications, approved by board action with a copy of the minutes, shall be submitted by the board to the division for review and approval.

(c) The division shall review and approve the schematic plan submittal based on:

1. Site plan: proper siting of the building footprint provides appropriate access, vehicular and pedestrian circulation, separation of bus loading area from other vehicular traffic, parking, service, play and athletic areas, utility connections and drainage;

2. Floor plan: number, type, and size of the planned spaces, including support spaces, agree with the programmed spaces listed on the BG #1, the educational specifications, and are in compliance with 702 KAR 4:180 [~~4:004~~] and 702 KAR 4:170;

3. Functional aspects: review of the distribution of functions, or program space and the appropriateness for the needs of the facility;

3. 4. 702 KAR 4:180 Model Program Space: maximum gross area of elementary schools is limited to 110 percent of Model Program Space Total Gross Area, and maximum gross area of middle and high schools is limited to 115 percent of Model Program Space Total Gross Area;

5. [4.] Building efficiency: review of the percent of net program area to gross building area to meet or exceed the guidelines of 702 KAR 4:180 ~~[1:001]~~;

6. [5.] Budget: review of the estimated construction cost (gross area multiplied by the cost per square foot, plus site development costs) in relation to the BG #1 Total Construction Cost. If the estimated ~~[calculated]~~ construction cost exceeds BG #1 Total Construction Cost ~~[cost]~~, an increase in the budget or a decrease in the physical scope of the project shall be approved by the board.

(2) After written approval of the schematic plans is received from the division, the architect shall prepare the design development plans.

(a) The board shall submit to the division for review and approval:

1. Design development plans;
2. Board order approving plans;
3. BG #2; and
4. BG #3.

(b) The division shall review and approve design development plans submittals based on:

1. Site plan: proper siting of the building with respect to vehicular and pedestrian circulation, separation of bus loading area, student play areas, athletic fields, utility construction and site drainage, with details appropriately developed;
2. Floor plan: number, type, and size of the planned spaces consistent with the schematic plan;
3. Enlarged plans and details: appropriate to describe the design intention;
4. 4. 702 KAR 4:180 Model Program Space: maximum gross area of elementary schools is limited to 110 percent of Model Program Space Total Gross Area, and maximum gross

area of middle and high schools is limited to 115 percent of Model Program Space Total Gross Area;

5. [4.] Building efficiency: the percent of net program area to gross building area meets or exceeds the guidelines of 702 KAR 4:180 ~~[4:001]~~;

6. [5.] Budget: the Grand Total Cost on the Statement of Probable Cost ~~[probable construction cost]~~, BG #3, is within the approved BG #1 Total Estimated Cost budget. If the Grand Total Cost ~~[probable construction cost]~~ exceeds the BG #1 Total Estimated Cost ~~[budget]~~, an increase in the budget or a decrease in the physical scope of the project shall be approved by the board;

7. [6.] BG #2 form is properly completed and conforms to the educational program specifications; and

8. [7.] Design development plans incorporate all previous schematic design review comments.

(3) After written approval of design development plans is received from the division, the completed plans and specifications and project manual shall be prepared by the architect and, if applicable, the CM<sub>1</sub> for bidding.

(a) The board shall submit to the division for review and approval:

1. Completed plans and specifications and project manual ~~[if applicable]~~;
2. Board order approving plans and specifications;
3. Revised BG #3; and
4. Proof of submission of completed plans to other agencies having jurisdiction.

(b) The division shall review and approve the completed plans and specifications and project manual submittals based on:

1. Compliance with 702 KAR 4:170, with special concern to reduce change orders during construction;
2. Compliance with state law regarding the seal, signature and date of the documents by architects and engineers [~~Each drawing and cover of the project manual has the architect's seal and signature affixed~~];
3. Documents are of sufficient detail and complexity that they may be used:
  - a. To obtain a building permit;
  - b. As instruments in the competitive bidding process; and
  - c. By a general contractor to construct the project;
4. BG-3 Grand Total Cost does not exceed by ten (10) percent the approved BG #1 Total Estimated Cost budget;
5. Deed, certificate of title insurance to the property, deed of easements for all utilities, and proof of road and utility access for the project are filed with the division;
6. Proposed floor elevation is a minimum of one (1) foot above the 100-year flood plain elevation for new construction and no state funds are proposed for renovation below the 100-year flood plain elevation;
7. Construction documents include the following forms to the extent applicable with KDE amendments appropriate for general construction or construction management:
  - a. AIA A201, General Conditions;
  - b. AIA A201/CMa, General Conditions with CM;
  - c. AIA A101, Owner-Contractor Contract;
  - d. AIA A101/CMa, Owner-Contractor Contract with CM;
  - e. AIA A701, Instructions to Bidders;

- f. KDE Form of Proposal;
  - g. AIA A310, Bid Bond;
  - h. AIA A312, Performance and Payment Bond;
  - i. AIA G702, Application for Payment;
  - j. AIA G702/CMa, Application for Payment with CM;
  - k. AIA G701, Change Order;
  - l. AIA G701/CMa, Change Order with CM;
  - m. AIA G704, Certificate of Substantial Completion;
  - n. AIA G704/CMa, Certificate of Substantial Completion with CM;
  - o. AIA G706, Contractors' Affidavit of Payment of Debts and Claims;
  - p. AIA G706A, Contractors' Affidavit of Release of Liens;
  - q. AIA G707, Consent of Surety to Final Payment; and
  - r. AIA G707A, Consent of Surety to Reduction in or Partial Release of Retainage.
8. A 100 percent performance and payment bond is required for any contract in excess of \$25,000 and on all contracts using CM process from an insurance firm authorized to do business in Kentucky. The insurance firm shall be listed in and the performance and payment bond shall be written within the terms and limits established in 58 Federal Register, P. 35778, 1993.
9. Contractor(s) shall ~~are to~~ carry all insurance required by law and by contract to hold the board safe from loss until the project is completed or an occupancy permit is received by the board, except that unless otherwise provided in the bidding documents, the board shall purchase and maintain property insurance written on a builder's risk "all-risk" or equivalent policy in the amount of the initial Total Construction Cost, plus value of subsequent

contract modifications and the cost of materials supplied and installed by others,  
comprising total value for the entire project at the site on a replacement cost basis without  
optional deductibles; and [~~In the event the board elects to carry a portion of the necessary~~  
~~insurance, notification shall be given to the architect and CM and written into the bidding~~  
~~documents; and ]~~

10. Notification of other state and local agencies having jurisdiction, including:

(a) Department of Housing, Buildings and Construction;

(b) Division of Building Codes [~~Code~~] Enforcement;

(c) Division of Plumbing;

(d) Division of Water;

(e) Division of Air Quality;

(f) Local health department; and

(g) Local building inspector.

(4) The board shall receive written approval of the construction bidding documents and authorization to bid from the division prior to advertisement for bids.

(5) Performance specification procedures may be used by the board for proposed capital construction projects. The proposed performance specifications as prepared by the board shall be approved in writing by the division prior to advertisement for bids.

(6) Leases, lease purchases, or leases with an option to purchase by a board for fixed equipment, capital construction, or alterations to existing buildings and building systems shall require the submittal of plans and specifications and lease documents to the division for review and approval.

Section 7. Construction Bidding, Bond Sale and Contracting.

(1) A minimum of ten (10) working days prior to the scheduled bond sale date, the board shall submit to KDE for review and approval:

(a) To the division:

1. Bid tabulation(s);
2. Bid security(ies);
3. Proposal form of successful bidder(s);
4. Proposed contract(s) or purchase order(s) (unsigned);
5. Revised financial form (BG #1, page 3) to coincide with proposed construction costs;
6. Architect's written recommendation regarding award of contract; and

(b) To the Division of District Operations [~~Finance~~], KDE:

1. Preliminary official statement;
2. Notice of bond sale; [~~and~~]
5. Official terms and conditions; and [-]

4. Plan of financing.

(2) If the submitted documents are not in an approvable form at least five (5) working days before the scheduled bond sale, the sale date shall be postponed.

(3) The board shall contract with a fiscal agent to assist in meeting all reporting, filing, and selling requirements for securing the financial approval of KDE when school revenue bonds are proposed for sale.

(4)(a) Bids for school revenue bond sales shall be received in Frankfort, Kentucky, at:

1. Kentucky Department of Education, Office of District Support Services, 15th Floor, Capital Plaza Tower; or



2. SFCC, 229 W. Main St., Suite 102, Frankfort, KY, 40601, [~~Capital Annex~~], if SFCC funds are involved.

(b) A KDE or SFCC staff member shall be present to receive the bids.

(c) Bids shall be delivered by mail, in person, by telephone, electronically or by facsimile (fax) machine. If the apparent winning bid is telephoned, the bid shall be reaffirmed by fax within thirty (30) minutes after the bid opening.

(5) The division shall approve a proposed construction contract based on:

(a) Submission of tabulation of bids, form of proposal, bid security and proposed contract;

(b) Board order indicating low bid was accepted or written justification provided where other than low bid is proposed;

(c) Proposed construction contract is within approved budget; and

(d) Form of proposal is completed in accordance with the instructions to bidders.

(6)(a) Any discrepancies between the proposed contract and bidding documents shall be remedied prior to approval.

(b) The board's desire to waive irregularities and informalities as to a bid shall be reviewed and final judgment made by the division prior to approval of the contract and financing plan.

(c) Approval of the proposed contract by division shall not indicate the contract is the best or the most reasonable.

(7) The Division of District Operations [~~Finance~~], KDE, shall issue the final approval for the financing plan, authorize the bond sale, and prepare the approval letter for the chief state school officer or his or her designee [~~officer's approval~~].

(8) No negotiation of the bid price shall be allowed, except in accordance with KRS 45A.375 for those districts under the Model Procurement Code.

(9) Construction account expenditures that are subject to bidding shall be approved by the division, except for expenditures for moveable equipment.

(10) The board shall submit to the division:

(a) Copy of the executed contract(s) and purchase order(s);

(b) Insurance certificate(s), a copy of the property insurance policy; and

(c) Copy of the 100 percent performance and payment bond(s).

#### Section 8. Contract Change Orders.

(1)(a) All change orders shall be submitted to the division, and shall be accompanied with the following:

1. Copy of local board action approving the change order;

2. Properly [~~Property~~] completed KDE Change Order Supplemental Information Form; and

3. Cost breakdown which separates labor, material, profit and overhead. If unit prices are utilized, this cost breakdown shall not be necessary.

(b) Changes in the contract which do not substantially alter the nature of the contract, or may be regarded as incidental to or which relate to an integral part of the original contract and specifications, may be approved by the division.

(c) A copy of any change order using the forms AIA G701 or AIA G701/CMA issued in connection with the project shall be signed by the appropriate parties as a recommendation and shall be subject to approval by the board.

(2) Any additive or deductive change order proposal in excess of \$7,500 [~~\$5,000~~] shall be subject to approval by the division prior to execution.

- (3) Approval of proposed change orders over \$7,500 [~~\$5,000~~] shall be based upon:
- (a) Completed supplemental information form, board order, and cost breakdown;
  - (b) Cost [~~is~~] calculated according to contract unit prices or alternative method with documentation [~~is~~] provided to support cost;
  - (c) The change order scope and cost are considered within the norm based upon the information submitted; and
  - (d) Cumulative cost of contract and all change orders are within the approved budget.
- (4) The division approval shall not indicate the change order cost is the best cost or the requested change order is the most appropriate action.

Section 9. Construction Contract Retainage.

- (1)(a) The board shall retain ten (10) percent from each application for payment up to fifty (50) percent completion of the work, then, provided the work is on schedule and satisfactory, and upon written request of the contractor together with written consent of surety and the recommendation of the architect, the board shall [~~may~~] approve a reduction in retainage to five (5) percent of the current contract sum.
- (b) No part of the five (5) percent retainage shall be paid until after substantial completion of the work, as defined in AIA A201-2007, General Conditions of the Contract for Construction. [~~the division has made a final on-site review of completed instructional space and has provided written approval for final payment or further reduction in retainage.~~]
- (c) After substantial completion of the work, if reasons for reduction of the retainage are certified in writing by the architect [~~and approved by the board~~], a reduction to a lump sum amount less than the five (5) percent retainage shall [~~may~~] be approved by the board, provided the [~~division when deemed reasonable. The~~] minimum lump sum retainage

[amount] shall be twice the estimated cost to correct remaining deficient or incomplete work.

~~(d) The board shall request a final on-site review by the division after approval of the architect's certification of substantial completion.~~

(2) The investment earnings resulting from any agreement entered into by a board involving the construction account, including the construction contract retainage for an approved project, shall be invested in such a manner that any additional income from the investment shall accrue only to the board.

#### Section 10. Construction Dispute Resolution.

(1) Unresolved claims between parties arising out of or relating to any contract subject to this administrative regulation shall not utilize arbitration or the American Arbitration Association unless agreed to by all parties.

(2) Prior to the initiation ~~[institution]~~ of legal proceedings, unresolved claims arising out of or relating to any contract shall be subject ~~[submitted]~~ to mediation, which shall be in accordance with the Construction Industry Mediation Procedures of the American Arbitration Association in effect on the date of the contract, and, if the parties fail to resolve their disputes through mediation, to binding dispute resolution. ~~[by the Mediation Center of Kentucky, 271 West Short Street, Suite 200, Lexington, Kentucky, or any other nonprofit mediation council approved by the division.]~~

(3) Mediation may be initiated by written request filed by any party.

#### Section 11. Construction Contract Closeout ~~[Close-out]~~ Process.

(1) The architect shall furnish the board a form BG #4 with applicable information requesting final approval.

(2)[(a)] If the board agrees the construction contract is complete, it shall approve the BG #4 and forward it to the division for review and approval [~~of the final payment~~].

~~(b) If the board does not agree that the construction contract is complete, a letter to the division shall be issued to indicate those items in contention or requiring completion.~~

~~(3) Written approval by the division authorizing full payment of the contract shall be given when the completed BG #4 form is approved.~~

#### Section 12. Penalties for Malfeasance or Nonfeasance.

(1) A determination by the board or the division of malfeasance or nonfeasance by the architect or CM shall be forwarded to the chief state school officer.

(2) The chief state school officer may make a recommendation to the KBE to determine that the offending firm is ineligible to provide professional services on school construction projects for a period not to exceed five (5) years.

(3) The KBE may prescribe alternative penalties.

(4) If the principals of the offending firm become associated with another firm(s) during the penalty period, upon recommendation by the chief state school officer the KBE may determine that the penalty invoked shall also apply to that firm.

Section 13. Documents Incorporated By Reference. (1) The following documents are incorporated by reference:

(a) BG #1-2008 [~~May, 1993~~], Project Application;

(b) AIA B101-2007, [~~B151-1997, Abbreviated~~] Standard Form of Agreement Between Owner and Architect and KDE Amendment, 2008 [~~April, 2000~~];

(c) AIA B141 AIA/CMA-1992, Standard Form of Agreement Between Owner and Architect, Construction Manager-Adviser Edition, and KDE Amendment, May, 1993;

- (d) KDE Non-Collusion [~~Noncollusion~~] Affidavit, May, 1993;
- (e) KDE Architect RFP, May, 1993;
- (f) KDE Architect Fee Guideline, May, 1993;
- (g) KDE Construction Manager (CM) RFP, May, 1993;
- (h) AIA B801/CMa-1992 AIA, Standard Form of Agreement Between Owner and Construction Manager and KDE Amendment, May, 1993;
- (i) KDE CM Fee Guideline, May, 1993;
- (j) BG #2, 2008 [~~May, 1993~~], Outline Specifications;
- (k) BG #3, 2008 [~~May, 1993~~], Statement of Probable Construction Cost;
- (l) AIA A201- 2007 [~~1997~~], General Conditions of the Contract for Construction and the KDE Amendment, 2008 [~~April, 2000~~];
- (m) AIA A201/CMa-1992, General Conditions of the Contract for Construction- Construction Manager-Adviser Edition, and KDE Amendment, May, 1993;
- (n) AIA A101- 2007 [~~1997~~], Standard Form of Agreement Between Owner and Contractor and KDE Amendment, 2008 [~~April, 2000~~];
- (o) AIA A101/CMa-1992, Standard Form of Agreement Between Owner and Contractor- Construction Manager-Adviser Edition, and KDE amendment, May, 1993;
- (p) AIA A701-1997, Instructions to Bidders and KDE Amendment, April, 2000;
- (q) KDE Form of Proposal, April, 2000;
- (r) AIA A310-1970, Bid Bond;
- (s) AIA A312-1984, Performance Bond and Payment Bond and KDE amendment, May, 1993;
- (t) AIA G702-1992, Application and Certificate for Payment;

- (u) AIA G702/CMa-1992, Application and Certificate for Payment-Construction Manager-Adviser Edition;
  - (v) AIA G701-2000, Change Order;
  - (w) AIA G701/CMa-1992, Change Order-Construction Manager-Adviser Edition;
  - (x) AIA G704-2000, Certificate of Substantial Completion;
  - (y) AIA G704/CMa-1992, Certificate of Substantial Completion-Construction Manager-Adviser Edition;
  - (z) AIA G706-1994, Contractors' Affidavit of Payment of Debts and Claims;
  - (aa) AIA G706A-1994, Contractors' Affidavit of Release of Liens;
  - (bb) AIA G707-1994, Consent of Surety to Final Payment;
  - (cc) AIA G707A-1994, Consent of Surety to Reduction in or Partial Release of Retainage;
  - (dd) 31 CFR 223, 2002 [~~1993~~];
  - (ee) KDE Change Order Supplemental Information, April, 2000;
  - (ff) KDE Purchase Order Form, May, 1993;
  - (gg) KDE Material Supplier Authorization Form, May, 1993; ~~and~~
  - (hh) BG #4, 2008, Project Closeout Form; [~~May, 1993, Final Approval and Payment Application~~];
  - (ii) AIA B214-2007, Standard Form of Architect's Services; LEED Certification;
  - (jj) AIA G801-2007, Notification of Amendment to the Professional Services Agreement;  
and
  - (kk) AIA G802-2007, Amendment to the Professional Services Agreement.
- (2) These documents are available for inspection, copying (subject to copyright law), and, except for the AIA documents, may be obtained from the Division of Facilities

Management, Department of Education, 15th Floor, Capital Plaza Tower, 500 Mero Street, Frankfort, Kentucky 40601, Monday through Friday, 8 a.m. to 4:30 p.m. The AIA documents are available for purchase from the American Institute of Architects by calling 800-365-2724.